IN THE SUPREME COURT OF THE UNITED STATES

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JOEL JUDULANG, :

Petitioner :

v. : No. 10-694

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL :

- x

Washington, D.C.

Wednesday, October 12, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

MARK C. FLEMING, ESQ., Boston, Massachusetts; on behalf of Petitioner.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-694, Judulang v. Holder.

Mr. Fleming.

ORAL ARGUMENT OF MARK C. FLEMING

ON BEHALF OF THE PETITIONER

MR. FLEMING: Mr. Chief Justice, and may it please the Court:

In Hernandez-Casillas, the Attorney General confirmed that a lawful permanent resident subject to deportation, quote, "must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and upon reentry been subject to exclusion."

2 months later in its published decision in Matter of Meza, the BIA again confirmed that an immigrant deportable for an aggravated felony could seek relief because his conviction could also form the basis for excludability.

Immigrants in situations indistinguishable from Mr. Judulang's applied for and received relief under this rule. The BIA's decision in Blake changed the law. Without explaining or even initially acknowledging that it was doing so, the Blake rule was

impermissibly retroactive, and it is arbitrary and capricious on its own merits. We would submit the evidence --

JUSTICE SCALIA: How do you explain -- I mean, I think that is a principal point, whether Blake and Brieva changed the law. How do you explain the language in Matter of Wadud, which antedates by a good deal those two cases, 1984, which says: "Section 212(c)can only be invoked in a deportation hearing where the ground of deportation charged is also a ground of inadmissibility." It seems to me that that's the basic point.

MR. FLEMING: Two responses to that, Justice Scalia. I agree, Matter of Wadud is the principal response that the government has, and it does not help them at all. Wadud was deportable for a conviction under 18 U.S.C. 1546, and the BIA had held in a case called Matter of RG in 1958 that that conviction did not render him excludable.

And that is confirmed later in the case of Matter of Jimenez-Santillano, which also involved a 1546 conviction, where the BIA says that if Mr. Jimenez had left of the country and returned it appears that he would not have been inadmissible and compares that situation to someone convicted of a firearms offense,

which the board and the Attorney General had always said were not waivable.

To the extent there is any ambiguity in the language that Your Honor read, it could not have survived the Attorney General's decision in Hernandez-Casillas, which I just quoted at the beginning of the presentation, which said that what one looks to is whether alien in exclusion proceedings would be able to invoke section 212(c) relief. And when the board then addressed the case of the aggravated felony in Matter of Meza, it did not even address Wadud or view it as binding at all. It looked to the conviction and whether it formed a basis for excludability.

And the BIA then followed up with no fewer than eight decisions in crime of violence cases indistinguishable from this case where the BIA cited, not Wadud, not any of the other cases that the government is relying on, but cited Meza as articulating the doctrine that the focus of analysis is on the conviction. And the Court has the briefs of several former immigration officials, including two INS general counsel and several INS trial attorneys, confirming that that was the position and the basis on which the government litigated these cases --

JUSTICE KAGAN: Mr. --

MR. FLEMING: And in fact -- yes, Justice Kagan?

JUSTICE KAGAN: Please finish.

MR. FLEMING: If I may, I was just going to say that a number of these cases, crime of violence cases, reached the merits in both the BIA and the courts of appeals without the government even suggesting that there was a statutory counterpart problem. In fact, when it has suited its purposes the government and the BIA have admitted that Blake was a change, including in a brief filed in the Ninth Circuit less than a year ago.

JUSTICE KAGAN: You cite some cases. You say there was a dramatic change in the law. The government cites some cases and it says there was no change in the law. What if the truth lies someplace in the middle. What if, in fact, when you look before Blake what you see is some amount of confusion; that the board sometimes was following the Blake rule, but that at other times individual judges or maybe the board itself were doing something different, because the individual circumstances suggested that they should, or just because they weren't so clear on the difference between these two approaches.

And then Blake comes along, and what Blake does is neither to change something dramatically nor to

just reaffirm what was there, but in some sense to create a little bit of order out of chaos. What would that do to your argument if that's the way one understood Blake?

MR. FLEMING: Obviously, Justice Kagan, we don't think that is the proper way to understand Blake. But to answer the question, for purposes of the retroactivity analysis, the Court uses what the Court in St. Cyr called "considerations of fair notice, reasonable reliance, and settled expectations." And we would submit that reliance was more than reasonable and expectations more than settled as to how the board was addressing crime of violence aggravated felony convictions prior to Blake, as is shown by the evidence that I cited a minute ago, namely the position that the government itself was taking in these cases and the way that immigrants would have been advised by both criminal defense counsel and immigration counsel, including, for that matter, INS trial counsel.

JUSTICE SCALIA: Well, reliance on confused law is certainly not reasonable reliance. I mean, if you accept the -- the premise that Justice Kagan operates from, how can you say that -- that you're reasonably relying on confused law?

MR. FLEMING: I don't accept the premise at

all, Justice Scalia, that the law was confused.

JUSTICE SCALIA: Well, that's a different point.

MR. FLEMING: But even if -- even if there was some lack of clarity in the law, and we don't think there was, I think the record in this -- before the Court is very clear, that people were advised by competent counsel and that the government itself took the same position in front of the immigration courts and the courts of appeals that someone with a crime of violence aggravated felony conviction could seek relief because that conviction would make him or her excludable and the availability of relief in deportation proceedings is meant to be the same as it would be in exclusion proceedings.

CHIEF JUSTICE ROBERTS: I understand the advice of counsel, but what is the reasonable expectation of that's been altered?

MR. FLEMING: The reasonable expectation that once someone pleads guilty, Mr. Chief Justice, to an excludable offense, one that would be waivable in exclusion proceedings, that a waiver may be sought in subsequent deportation proceedings on exactly the same basis. And that is the published policy of the BIA.

CHIEF JUSTICE ROBERTS: So you're saying

that the expectation is when he pleads guilty to a violent felony, that he expects, well, if I am deported because of that I am going to be able to seek discretionary waiver?

MR. FLEMING: Yes, that's quite correct, Mr. Chief Justice. That is the ruling in St. Cyr, that when someone -- when someone pleads guilty to an offense that is eligible for relief under 212(c) there is reliability on the possibility -- not a guarantee of a waiver, obviously, but the avoidance of mandatory deportation, appealing to the discretion of the Attorney General.

CHIEF JUSTICE ROBERTS: How often are these waivers granted?

MR. FLEMING: Quite frequently, I think. The Court pointed out in St. Cyr that they are frequent and now, because the category of people who are eligible involves people who have very old convictions, they necessarily pled before 1996, they are usually minor offenses, they involve people who have been in this country for a long time, they frequently have property, they have families, they can show rehabilitation. Often they only come to the attention of the immigration authorities by applying for naturalization or by renewing their green cards, and they get thrown into

deportation on the basis of these old convictions that at the time of the plea would have been eligible for at waiver, and it is simply unfair to change the law, as Blake did, and impose that change on people who relied on it in pleading guilty.

CHIEF JUSTICE ROBERTS: But in terms of the expectation interest, we have to visualize someone who is facing a serious charge and is entering a plea bargain, where presumably the consideration of what he's pleading to, how much of a sentence he's going to get, all that, are dominant considerations. And he's also going to say: Well, I have been advised that I will be able to apply for a discretionary waiver, so I'm going to plead guilty. That's a fairly unlikely scenario, isn't it?

MR. FLEMING: On the contrary, Mr. Chief Justice. The Court in St. Cyr made very clear that's a very likely situation. It cited a couple of cases at that time that specifically involved that colloquy. The NIJC amicus brief which is before the Court in this case identifies a couple of situations, including the case of Mr. Ronald Bennett, who was advised by his lawyer that when he pled guilty it would not be a problem for him for his immigration status because he could seek 212(c) protection.

CHIEF JUSTICE ROBERTS: No, no. I'm not questioning the fact that he was advised, but presumably the lawyer will also advise him: Oh, and you also have to pay the $250, you know, restitution, whatever, fee. I am just questioning how significant that advice will be when someone's determining whether to plead guilty or not to a violent felony.

MR. FLEMING: I -- I understand, Mr. Chief Justice. It is quite significant for people whose ability to stay in this country is highly important to them. They have family here, they have lived here for decades. The risk that they are going to be --

JUSTICE GINSBURG: And the violent felony -- the violent felony in this case, he had a suspended sentence, didn't he?

MR. FLEMING: He was sentenced to -- to time served essentially for this conviction, that's right.

JUSTICE ALITO: Now, if he had been convicted of a lesser offense that was not a crime involving moral turpitude, he would not be eligible for the waiver, isn't that right?

MR. FLEMING: That -- if -- if the offense would not have been waivable in the exclusion proceedings, he would not be eligible, that's correct,

Justice Alito. But there might be other forms of relief that he --

JUSTICE ALITO: Isn't that -- isn't that strange? Suppose you have somebody who is charged with a lesser offense that -- that doesn't involve moral turpitude and a greater offense that does, and the defense attorney comes to the client and says: I have got great news; the prosecutor will take a plea to the lesser offense and drop the greater one. I guess that would be -- that would be bad, potentially bad advice, because he ought to plead to the more serious offense because then he would be eligible for a waiver.

MR. FLEMING: He would be eligible for a waiver under section 212(c), Justice Alito, but that is not the only form of relief that someone who pleads guilty to a -- a crime could potentially seek. And people who plead to non-inadmissible offenses, offenses that do not lead to their exclusion, had other avenues at the time that they could have pursued. For instance, they could have pursued adjustment of status. That is the -- the BIA's decision in Matter of Gabryelsky. In order to adjust status, all that matters is that you not be inadmissible to the country. And even if you are inadmissible, you can seek a 212(c) waiver during that process. Whether you are deportable or not doesn't

matter.

So there are many other ways. Looking at section 212(c) on its own, it might appear anomalous. But looking at the immigration law as it was before 1996, there are other options.

JUSTICE SCALIA: But what you say even further reduces the significance of the 212(c) possibility of waiver to the person pleading guilty. You are saying -- you are saying, yes, even though -- even though you couldn't get it under 212(c), there are a lot of other ways you might have gotten it.

MR. FLEMING: I'm sorry, Justice Scalia. Maybe I wasn't clear. The people who could get the other relief are people who pled guilty to crimes that do not involve moral turpitude, which was Justice Alito's hypothetical. But people who plead to crimes involving moral turpitude potentially don't have that -- that avenue open to them.

JUSTICE SCALIA: But --

MR. FLEMING: For them, section 212(c) is very important and they could rely on its availability, and did.

JUSTICE SCALIA: But there is a large category of people who -- who plead guilty to crimes that do not involve moral turpitude and yet are not

otherwise excludable under 212(c); right?

MR. FLEMING: I don't know which category Your Honor is thinking of. But certainly you can plead guilty to a crime that does not involve moral turpitude; then you would not be eligible for 212(c) relief; but there might be some other way that you can -- that you can get at it.

But that is not this category of people. The category of people at issue here are people who pled before 1996 to aggravated felony crimes of violence, almost all of which, if not all of which, are going to be crimes involving moral turpitude that are excludable and therefore eligible for a waiver. It does not necessarily mean they will get it; but it at least means they have the right to ask the Attorney General to exercise his discretion.

And I submit that, as this Court indicated in St. Cyr, the private interest in avoiding mandatory deportation is very strong. We have what I believe is a sudden and abrupt change in the law in Blake; and it could not have been foreseen, in fact it wasn't foreseen by advocates on both sides of the "v" in these cases.

The remaining question for purposes of the retroactivity analysis is only the strength of the agency's interest in applying the rule retroactively. I

submit that that interest here is no stronger than it is in the ordinary mine run of cases, and in fact it is weaker, because all that we are talking about is the opportunity to submit an application for adjudication on the merits, which is subject to the discretion of the agency. Mr. Judulang would have the burden of convincing an immigration judge and the Board of Immigration Appeals that he deserves relief in the exercise of discretion. And so under Chinnery --

JUSTICE GINSBURG: Any change is a sharp change. I think this is a very confusing set of decisions. And the Wadud case that was brought up before has a footnote that says that the board had stated a waiver of inadmissibility may be granted in deportation if the alien was excludable as a result of the same facts. And then that footnote ends "we shall withdraw from that language in each of these cases."

MR. FLEMING: That's correct, Justice Ginsburg, and the operative language there is "as a result of the same facts."

What Wadud was arguing was that recognizing that his conviction would not make him excludable, because it was not a crime involving moral turpitude, he said nonetheless he should look to the facts of my conduct, because what I did was so turpitudinous that

the government would surely have charged me as excludable. And the board said: We are not going to do that, and to the extent our prior decision suggested that we are withdrawing from that language.

It did not say, however, that the board would not look to convictions to determine excludability, and in fact in Meza which was after Wadud it did just that. And when the Court came to crime of violence cases subsequently to that, the precedent that it relied on was Meza, which focuses on the conviction. I agree it does not focus on the facts, but I don't think the language that Your Honor read undermines our position at all.

JUSTICE ALITO: That is so bizarre, it makes me -- he is pleading to prove that what he did was really turpitudinous. It makes me think that maybe the en banc Ninth Circuit was right, that this whole line of cases has gone off along the wrong track quite a while ago.

MR. FLEMING: So -- I mean the notion that this form of relief is available in deportation proceedings is long settled.

JUSTICE ALITO: Yes, yes.

MR. FLEMING: It's the premise of this Court's decision in St. Cyr. The agency has never

undermined it or suggested that it was going to retreat from it. No party before this Court is suggesting that St. Cyr should have been overruled on that basis, so I -- and I think it's very clear that Congress, after the relief had been extended to deportation proceedings, enacted provisions in 1990 and 1996 that would have no operative effect if relief was not available in deportation proceedings.

JUSTICE KENNEDY: Well, a lot -- a lot of the statutory changes in the policy of the INS date back to, was it the Second Circuit's case in Francis, which talked about the equal protection component of the two classes comprised of those in exclusion proceedings and those in what were then called deportation proceedings.

Do we just accept that? It -- it seems to me that that whole equal protection rationale is quite doubtful.

MR. FLEMING: Well, there -- there are two responses to that, Justice Kennedy. The first is the agency has accepted that in Matter of Silva as a correct interpretation of the statute, and that has been on the books for 35 years now, approximately, and Congress has never suggested any disapproval of it. Rather, on the contrary it has assumed that that is the law, and that's after the Solicitor General refused to seek certiorari

of that decision. The comparison also was not between people in exclusion and people in deportation. It was between two --

JUSTICE KENNEDY: So if we thought that they had gone down the wrong path originally, there is nothing we can do about it, and we just say we're in this wilderness and we can't get out?

MR. FLEMING: I think, Justice Kennedy, Congress at this point has not only acquiesced, but indicated its understanding of the -- of the way the agency has applied the law. And honestly I think this is a -- a question for the government, because the agency has never suggested that there was any basis for retreating from that position at this late date.

Unless the Court has further questions on retroactivity, I would move quickly to our substantive position, which is that even without regard to retroactivity, the Blake rule is arbitrary and capricious, and there are two basic reasons for that: First, that it rests on improper factors; and second, that it leads to results that the BIA itself has disavowed.

First of all, Congress has never suggested that the words that it chooses in deportation provisions are somehow a key to eligibility for section 212(c)

relief, and yet that is largely everything that the board relied on in Blake, was a comparison of the choice of words in deportation provisions to the choice of words in exclusion provisions. But the -- the provisions of the deportation statute are not some enigmatic code from which the BIA can discern section 212(c) eligibility. They determine who is deportable, but they have nothing to say about who is eligible for section 212 c. Section 212 c eligibility turns on whether you are inadmissible. That is what 212 c by its terms refers to. And that's driven home, I believe, by the addition of the crime of violence language in 1990 as a basis for deportation. Aggravated felonies were added in 1990 at a time when it -- I believe it's clear that most of them, if not all of them, were already bases for exclusion. So there was no need for Congress to say crimes of violence are excludable, they already were because they were crimes involving moral turpitude. It would have been redundant to put the same words in the exclusion statute. Congress didn't do it. Congress simply wanted to make clear that these people were now going to be deportable based on the length of their sentence.

JUSTICE GINSBURG: What about the comparability of the crime involved as it says here that

was a drug offense. Does the inadmissibility criterion, does that accord with the one for deportation?

MR. FLEMING: Yes, it does, Justice Ginsburg. And because Mr. St. Cyr would have been both deportable and excludable for his offense. That is the logic.

JUSTICE GINSBURG: That ending with the comparison works, right.

MR. FLEMING: Well, the board in Blake concluded that that was -- that the linguistic comparison worked there so that it did not have to find itself at odds with this Court's decision in St. Cyr, that's true. But when the Court -- when the board originally made that decision in matter of Meza, they didn't just look to the linguistic comparison. I agree that if there is a perfect linguistic match, then you might not need to go to look at the conviction, because someone who falls under one may not necessarily fall under the other. But just because Congress uses different words in the deportation subsection that is asserted against a particular alien doesn't mean that the analysis stops, there, because the conviction might well make the person excludable such that the application that they are able to file in deportation proceedings should give them the same relief that they

would have in an exclusion proceedings. So what happened in 1990 when "crime of violence" was added, according to the government, is that that was a radical change in section 212 c eligibility stealthily and silently, because of course while Congress was amending 212 c at that time, saying it was no longer available to deportable aliens who didn't show up for certain hearings and no longer available for aggravated felons who were deportable who had served more than five years in prison, it had said nothing suggesting that people who had committed aggravated felony crimes of violence were all of a sudden ineligible for section 212 c relief, even though it could have said that. The notion that one can infer or decode those provisions as shutting out section 212 c relief for this group of people silently, even though the overlap is perfect if not near perfect is we would submit simply unreasonable. The arbitrariness comes through in another way which is that --

JUSTICE KAGAN: Mr. Fleming, the government says that it has an interest in treating people in deportation proceedings less favorable, if you will, than people in exclusion proceedings. Do you dispute that broad premise that the government could develop a system which treated those two groups differently?

MR. FLEMING: That is not the way that the agency has ever treated permanent resident aliens. In fact, if that is the government's position that is clearly a change in the law. The BIA said going back to Silva, but in matter of AA a 1992 published decision that it is the long -- quote "long established view of the Attorney General in the federal courts that an application for Section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. " That is footnote 22 of matter of AA. So the agency's longstanding position, at least since Silva, has been that there is no difference between an application filed in deportation and one filed in exclusion. And that I think is consistent with what Attorney General Thornburg said in the matter of Hernandez-Casillas.

I'd submit one last point, which is the arbitrariness of what the BIA is doing shines through in that it has led to consequences that the BIA has itself repudiated as inconsistent with the statute. And the most salient example is the one that the government admits on page 26 of its brief, which is that there is a possibility that someone could get a waiver of inadmissibility one day for a given conviction and then

be deported the next day for the very same conviction.

Now the BIA in 1956 in matter of G.A. said that was clearly repugnant. That the agency cannot have it both ways. The statute cannot mean X and not X. If it does, that is the Hallmark of arbitrariness. The government's only answer, as far as I know, is that it will exercise its prosecutorial discretion to avoid that situation. I would submit that an agency cannot defend an arbitrary policy by saying that it is going to be enforced in a capricious way and that it will all balance out in the end. This Court should evaluate the Blake rule on its own merits and if it is arbitrary, as it clearly is, it should be disapproved. The other indication of arbitrariness is that the Blake rule revives the distinction between deportable aliens, Justice Kennedy, who traveled abroad and returned and other deportable aliens who did not travel aboard and returned.

JUSTICE KAGAN: The government says that is not the case. The government says that it does not treat those two groups differently. Do you have evidence to the contrary?

MR. FLEMING: Yes, Justice Kagan. The evidence is the Attorney General's opinion in Hernandez-Casillas. The government's only citation for

that is a footnote in Wadud arguing that supposedly the nunc pro tunc doctrine is not still good law. But five years after Wadud, in Hernandez-Casillas, Attorney General Thornburg was asked by the INS to disapprove Matter of L -- Justice Jackson's decision as Attorney General, and Matter of G-A- and the nunc pro tunc doctrine that is set out in those decisions, and he expressly declined to do so. On the contrary, he reaffirmed that in cases where the alien has left and come back, the Attorney General and the board have permitted the alien to raise any claim for discretionary relief that the alien could otherwise have raised had he been excluded. So nunc pro tunc clearly is still good law, and the government seemed to agree with that as recently as its brief in opposition to certiorari. As for the travel distinction itself the government to its credit does not try to defend it, and for good reason. The agency in Silva has long held that there is no distinction or no rational way to distinguish under the statute between people who are in deportation proceedings who have left and come back and people in deportations who have not. Unless the Court has further questions I reserve of the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you counsel.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF THE RESPONDENT

MR. GANNON: Mr. Chief Justice and may it please the Court:

The Petitioner does not dispute that some comparability analysis must be applied to prevent relief under former section 212 c from being extended to certain grounds of de portability. But his methodology of asking whether his offense could have made him excludable is inconsistent with established cases from the board that long predated the ones at issue here involving firearms offenses and visa fraud.

Justice Scalia brought up the case in Wadud. That was a visa fraud case. It was a prosecution under 18 U.S.C. 1546. That's a provision that penalizes fraudulent and other misuse of visas and other immigration documents. It's a very broad criminal provision. It's long been a ground of de portability. And at the time the alien argued that this is fraud. It's a crime involving moral turpitude and therefore I would be subject to exclusion. In Wadud the board rejected that analysis.

JUSTICE BREYER: That's true. But it may save a little time. I worry we're in an arcane area of the law. It was created by Robert Jackson, Attorney General and by Thorn burg, Attorney General. And if we

are starting with that, what that says is we have a list over here of excludable things and we have a list of deportable things. And if you are deported for a reason that shows up on that first list, than the AG could waive. That's basically the outline I have. And also I have, which isn't quite right, that in that first list there is something called -- in big letters, CIMT or something, crime of moral turpitude. And all of the things on the second list, the big issue is, is it a crime of moral turpitude. As I looked through the opinions, this is what I got out of it. This is tentative. I got out, just as you say, there are two things in the second list which are not crimes of moral turpitude. They consist of illegal entry crimes and gun crimes. And there are special reasons for the first and the second is debatable, but they have been consistent with that. Then there are things that are on both lists, they are crimes of moral turpitude. I counted at least eight cases. Say, for example, rape, burglary, manslaughter, second degree robbery, indecency with a child and probably some others are all crimes of moral turpitude, so it cuts here, okay. Then I find Blake, and Blake says sexual abuse of a minor is not a crime of moral turpitude. That's a little surprising. But it gives us a reason because, and this was the problem

here, it talks about, there has to be substantial -- there has to be similar language in the two lists. I don't know where that one came from. It certainly had not been in the earlier cases. And now we have this case, which is voluntary manslaughter. I would have thought that voluntary manslaughter is right at the heart of the lists that they said the things are crimes of moral turpitude, and not like visa crimes or gun crimes, if I read the cases. So where do I end up? Well, what I end up with is this. And this is what I would like you to reply to. Justice Brandies once said something like we have to know before we can say whether an agency opinion is right or wrong, what they are talking about. I felt perplexity after I had read through these decisions. In other words, I don't understand it. So I would like you to explain to me why this all fits together and how, if you can do that, I couldn't get that clear explanation from the brief, and I suspect it is not your fault.

MR. GANNON: Well, I agree that the history and the law here is relatively complicated and it has had a lot of moving pieces over the years. But I think that the board has been very consistent, especially beginning in the 1984 Wadud decision that was picked up in the Jimenez-Santillano decision and also in firearms

offenses. Justice Breyer, you talked about the fact that the board had been consistent in firearms offenses. And the Petitioner does not dispute that firearms offenses are ones that do not have a comparable ground --

JUSTICE BREYER: Rape, burglary, manslaughter, second-degree robbery -- all of those cases -- about seven or eight of them.

MR. GANNON: If I could go back for a second to firearms offenses. The board there has continued to say that there is no comparable ground for firearms offenses, even if your firearms offense would be something that could have been considered a crime involving moral turpitude.

If you look at the board's 1992 decision in Montenegro, that was a case that was assault with a firearm, and so it wasn't merely possession of a handgun or an automatic weapon or a sawed-off shotgun --

JUSTICE GINSBURG: Is there any aggravated felony crime of violence that is not a crime involving moral turpitude?

MR. GANNON: Yes, Justice Ginsburg. The board pointed out in the Brieva-Perez decision that minor but relatively common crimes of violence, including simple assaults and burglary, generally are

not considered to be crimes involving moral turpitude. In the reply brief, Petitioner points to a board petition in Louissaint saying that -- that the record is muddled on burglary, but that opinion only showed that residential burglary isn't a crime involving moral turpitude, and a crime of violence, in the definition, is one that involves the use of physical force against personal property of another.

And so it doesn't need to be aggravated in any other sense. It doesn't need to be --

JUSTICE GINSBURG: Was Judulang's crime a crime involving violence?

MR. GANNON: Yes, it was a crime --

JUSTICE GINSBURG: I mean a crime of moral turpitude.

MR. GANNON: Yes, it was. But what I'm trying to say, Justice Ginsburg, is that Petitioner's approach of looking to the conviction is inconsistent with the board's repeated --

JUSTICE BREYER: Don't -- that may be his approach. My approach is look to the category.

MR. GANNON: And, Justice Breyer --

JUSTICE BREYER: Look to the category. And the category here is not, you know, category as in crime, the category is what kind of a crime. And this

is a crime of violence. In the statute, or if you look at what was charged, it's called voluntary manslaughter. Either way, I would think those categories as categories fall within "crime of moral turpitude."

MR. GANNON: Well, but -- but the category that is relevant is the crime of violence. And as I just discussed with Justice Ginsburg, there are indeed crimes of violence that satisfy the statutory definition in 18 U.S.C. 16 --

JUSTICE SOTOMAYOR: But you're not -- you're not --

JUSTICE SCALIA: Can I hear this answer? I was very interested in the question. It seemed to make a good point.

JUSTICE BREYER: Thank you.

MR. GANNON: If I could finish up on the firearms analogy, I think that this is responsive, Justice Breyer, to your point about looking at the category. And in Montenegro, the board specifically concluded that this offense, assault with a firearm, it's a firearms offense, but because we've already concluded that as a categorical matter, firearms offenses aren't on the list of exclusion crimes; we don't care and we're not going to ask ourselves whether it could have been a crime involving moral turpitude.

The board applied that same reasoning again in the 1995 opinion in Espinoza. We quote all of these opinions on page 41 of our brief.

And so, in these two categories, firearms offenses and visa fraud offenses, both of which could often involve moral turpitude on an -- in any individual case -- that such offenses could involve moral turpitude, just like a crime of violence may well involve moral turpitude, and yet the board concluded that because as a categorical matter, this is not comparable to any grounds of exclusion, it was going to say that it was not going to extend this relief, that --

JUSTICE GINSBURG: What -- what --

CHIEF JUSTICE ROBERTS: Let's let Justice Sotomayor jump in now with her question.

JUSTICE SOTOMAYOR: I go back to Justice Breyer's question. What you just said made logical sense; the category of gun possession doesn't go in. Visa fraud doesn't become a crime of moral turpitude. But we have cases that have said generically, manslaughter which involves violence is a crime of moral turpitude. Others have qualified sexual abuse of a minor. I don't know of anyone who would think that that category of crimes, whether you call it indecency, touching or -- we've already said touching alone may not

qualify -- but my point is, you now are saying, I think, and correct me if I'm wrong, that aggravated violent felons is an entire category, and anything that falls under that label can't be a grounds of exclusion.

MR. GANNON: No.

JUSTICE SOTOMAYOR: That's how I read your categorical comparison, though.

MR. GANNON: The board has made it clear from as early as the Meza decision that it would look into the specific category within the definition of aggravated felony -- in order to be a category --

JUSTICE SOTOMAYOR: So now why is manslaughter not a crime of moral turpitude?

MR. GANNON: Because that is not the category in the aggravated felony definition that we are talking about. What we are talking about is crimes of violence. That's the category. And so --

JUSTICE KAGAN: But, Mr. Gannon, suppose this. Suppose that on the exclusion side, you have this category of crimes of moral turpitude, and suppose in the deportation side -- which I think is right, you have a category called crimes of violence, and you also have a category called crimes of moral turpitude. There is a time limit on that --

MR. GANNON: We do have that category here.

JUSTICE KAGAN: That's right. Suppose that you -- the government could have slotted manslaughter into either of those categories on the deportation side, and I understand that there is a dispute about whether it could have, but let's suppose it could have. So if manslaughter is categorized on the deportation side as a crime of violence, you say it doesn't match with the category on the exclusion side. But if the same crime is categorized in a different way by the government, then it does match on the exclusion side. So what sense does that make, the government's decision about how to categorize a -- a given offense on the deportation side is going to determine whether a person gets relief?

MR. GANNON: Well, I think that there's no dispute about that between us and Petitioner. If somebody had a firearms offense, it could have been charged either way.

JUSTICE KAGAN: But the Petitioner -- the Petitioner just says we look to manslaughter, and we ask whether that qualifies a person for relief on the exclusion side --

MR. GANNON: And what I'm trying --

JUSTICE KAGAN: But you are saying no, first, we have to put manslaughter in a category on the deportation side, and then we have to match that to the

category on the exclusion side. And what I'm asking you is kind of what sense does that make? Doesn't everything depend on which category you put manslaughter into?

MR. GANNON: Well, what it -- the reason it makes sense is because the statute only provides for relief from grounds of inadmissibility or exclusion.

By its terms --

JUSTICE KAGAN: You are so far from the statute, Mr. Gannon, you can't even tell what's closer to the statute. I mean, you are miles away from the statute.

MR. GANNON: Well, the way -- the way this doctrine developed, Justice Kagan, is that it developed in the context where the board recognized that the statute only applied to waiver of grounds of excludability, and it extended that to deportation cases when it was on the basis of the same grounds that could have been presented in the exclusion proceeding.

And so that's all we are trying to do here, is to continue with that --

JUSTICE GINSBURG: But what your position means that it's up to the agency -- up to the person who makes the charge. Because take Mr. Judulang, he could have been categorized as deportable because he committed

a crime in -- involving moral turpitude, or he could have been categorized as somebody who committed an aggravated felony. It is then totally in the hands of the person who is making the charge whether there will be a match or not.

MR. GANNON: The reason why that's so is because the thing that is going to be waived at the end of the proceeding is the ground of deportation. And so if the ground of deportation is for an aggravated crime of felony violence, then it needs to be one for which there's 212(c) eligibility. The same would be true if it were a firearms offense -- if it were --

JUSTICE GINSBURG: If -- if the officer labels the manslaughter in this case a crime involving moral turpitude, then there is a match --

MR. GANNON: That's --

JUSTICE GINSBURG: And if he labels it aggravated felony, crime of violence, then there is no match. So it's up to the charger whether there will be this match or not.

MR. GANNON: That's true. It's also true in the firearms offense cases and the visa fraud offense cases, because those are all instances in which, depending on the circumstance of the offense and depending upon what it was charged, the board has

concluded that the 1546 offense is divisible. Some of those crimes are involving moral turpitude, some of them are not. And I -- and so --

JUSTICE KAGAN: But this isn't a question about the history, Mr. Gannon. Even if we assume that you are right about the history, this is a question about whether this is an arbitrary system, and where you are devising it from and what lies behind with it.

MR. GANNON: And I think that this is not only consistent with the history, it is consistent with the text of the regulation the Petitioner is invoking here, which makes it clear that what is being waived is a ground of exclusion or deportability or removability.

And so what is relevant is whether the ground of removability is the aggravated felony crime of violence ground or the crime involving moral turpitude ground. Depending on which ground it is, that's what he is seeking relief for --

JUSTICE GINSBURG: Then -- then you have to say yes, you can have somebody who would get a waiver of inadmissibility for a crime, and the very next day be put in deportation without any waiver for that same crime.

MR. GANNON: We have no cases in which that has happened. And the cases in which the board said

that that result would be clearly repugnant were ones in which there was a comparable ground. The board was saying that if you get 212(c) relief on the grounds of exclusion --

JUSTICE GINSBURG: But these categories --

MR. GANNON: Pardon?

JUSTICE GINSBURG: These categories.

MR. GANNON: No, there -- there are no cases that address that principle in the context where there is no comparable grounds. And if -- if I could just make one point about this claim of Petitioner's in his reply brief that he could have been subject to a charge of deportability on the basis of a crime involving moral turpitude, I would caution the Court against relying on that for two reasons, one factual and one legal.

One is that there is no factual basis in the administrative record to -- to talk about this 1987 trip to the Philippines. Yes, we do have evidence from outside the record that makes us believe that it occurred, but the statute that provides for judicial review here of the order of removability in 8 U.S.C. 1252(b)(4)(A) specifically says that the determination needs to be made on a basis of the administrative record. And the only evidence in the record about that trip is actually a statement from Petitioner's mother

that says that it occurred in 1989, the year after the crime.

But even assuming that -- that the trip happened, in light -- as I said, we do believe on the basis of evidence outside the record that it did occur -- there is a legal reason why I would caution the Court against assuming that that means the Petitioner could have been deportable for a crime involving moral turpitude, and that is the so-called Fleuti Doctrine. Under this Court's 1963 decision in Rosenberg v. Fleuti, which is actually relevant to a case on which you granted certiorari a couple of weeks ago, this Court concluded that if an LPR takes a brief, casual, and innocent trip outside the country and returns to the United States, that will not trigger an entry upon his return to the United States.

And so I think it's very likely that under Ninth Circuit precedent in 1989, when Petitioner was pleading guilty to his voluntary manslaughter charge, he wouldn't have had any reason to think that he was doing so within 5 years of when he committed -- when he entered the country for purposes of the statute.

I think it's also --

JUSTICE BREYER: Can we go back to the second one? It's very interesting. Suppose I say:

Okay, I concede. I'd only do it for the sake of this question: You are absolutely right in your categorization. The right category is crime of violence. And then I look at the statute, which is 8 U.S.C. 1101(43), which you probably know by heart -- and I look at the definition of gun crimes, and I look at crimes of violence.

My non-schooled reaction is, well, gun crimes, I can see why they said that wasn't really a crime of moral turpitude, because there are a lot of registration requirements, there are all kinds of different things that drug dealers -- gun dealers have to do, and you could commit that crime in various ways that don't involve moral turpitude. I can understand that, sort of.

At least, I can see how somebody else might have understood it that way. Now, I think crimes of violence, I say, hey, I am having trouble here. Why don't you try to list a few crimes of violence that when they come into the country you are going to say, oh, that wasn't a crime of moral turpitude? And by the way, I am not asking you to list specific examples; I am asking you to list categories. List categories of crimes of violence that when the person comes in, you are going to say, hmm, no moral turpitude there.

MR. GANNON: The chief examples are the ones that the board gives in the Brieva-Perez opinion, which are simple assaults, which has --

JUSTICE BREYER: That is not a crime of -- that is not a moral turpitude, simple assault? You're going to just hit somebody?

MR. GANNON: That is correct, it is not a crime involving moral turpitude.

Neither is non-residential burglary which involves force against -- against property, which would therefore satisfy the definition. This is an opinion that --

JUSTICE BREYER: Burglary -- isn't burglary where it might be an occupied building?

MR. GANNON: If it were an occupied building, if it were a dwelling --

JUSTICE BREYER: Well, no. A warehouse. I am being -- quibbling now. Of course, my basic concern --

MR. GANNON: In the Ninth Circuit, burglary of a residential dwelling that's occupied is not a crime involving moral turpitude.

JUSTICE BREYER: Oh, really? Okay.

MR. GANNON: In -- in a case that is cited in the concurring opinion --

JUSTICE BREYER: So there are some. There are some.

MR. GANNON: There certainly are.

JUSTICE BREYER: They're a little odd, but what I'm raising --

MR. GANNON: They tend to be minor -- minor -- more minor offenses.

JUSTICE BREYER: Okay. What I'm afraid of is this: That once you put this in your category, that you say crimes of violence are not crimes of moral turpitude, then to a large extent you have said good-bye, Justice or Attorney General Robert Jackson.

MR. GANNON: I don't --

JUSTICE BREYER: You are saying good-bye to Jackson and Thornburgh, because you have driven such a wedge between these two statutes that there's hardly anybody who would be able to qualify for the Jackson-Thornburgh approach to this statute.

MR. GANNON: I just --

JUSTICE BREYER: I overstate slightly, but you see my point.

MR. GANNON: I see your point, Justice Breyer, and if you look at all of the cases that predate the era that we are talking about here, they all -- almost all involve two categories of defenses, drug

trafficking or controlled substance offenses and crimes involving moral turpitude, things that were actually charged under the ground of deportation for crimes involving moral turpitude.

And here, Congress added aggravated felonies to the deportation side of the ledger, but didn't add it to the exclusion side of the ledger. And then it repeatedly expanded the definition of "aggravated felony" between 1988 and 1996 in ways that made these offenses treatable in different ways for purposes of deportation than they were for exclusion.

And as a category --

JUSTICE SOTOMAYOR: Well, I keep going back to my question. There's only one category now, aggravated violent felony. That's the only category you are looking at. It doesn't matter, in your judgment. That -- that is your test.

MR. GANNON: That's -- I disagree, Justice Sotomayor.

JUSTICE SOTOMAYOR: If it qualifies as an aggravated violent felony, it cannot be a crime of moral turpitude.

MR. GANNON: I disagree with that -- the fact that that's the category we are looking at.

We're looking inside the definition of

aggravated felony, to the particular ground which is crimes of violence. And then what we are saying is that the analysis needs to be done at a categorical level. And the board has said that you cannot get a 212(c) waiver from a ground of deportability unless that ground of deportability is substantially equivalent to a waivable ground of exclusion.

JUSTICE SOTOMAYOR: Let's go back to a concrete example following Justice Ginsburg's example. Someone is charged with a crime of violence, voluntary manslaughter. And would an officer at the airport say you're not admittable; that's a crime involving moral turpitude? Could the officer say that?

MR. GANNON: Yes, the officer could say that.

JUSTICE SOTOMAYOR: And could he then waive that ground under 212(c)?

MR. GANNON: Generally, yes. I mean -- we are talking about pre-1996 offenses.

JUSTICE SOTOMAYOR: Now let's assume that he did, that he waives that crime of moral turpitude. Would the government now put that individual in deportation and say this voluntary manslaughter doesn't meet the statutory counterpart test. So for that very crime, we are going to deport you, even though we let

you in, because it's a crime involving violence.

MR. GANNON: We don't have any examples like that, and --

JUSTICE SOTOMAYOR: Would you? Can you?

MR. GANNON: And -- I --

JUSTICE SOTOMAYOR: Is that where your test leads you?

MR. GANNON: Well, ultimately, even the durability of the 212(c) waiver wouldn't necessarily have protected somebody against a subsequent proceeding.

JUSTICE GINSBURG: But yet in your brief, I thought you conceded that.

MR. GANNON: We --

JUSTICE GINSBURG: That -- just the example that Justice Sotomayor gave. Somebody is declared inadmissible because it's a crime with manslaughter or aggravated felony crime of violence is on the admissibility side a crime involving moral turpitude, so he's allowed in. And then he's in and he's declared deportable and he can't get a waiver because there's no analogue. I thought your brief said yes, that's the consequence of our argument; however, prosecutors would not seek deportation if inadmissibility had been waived.

MR. GANNON: Well, we -- the brief did say that this is hypothetically possible. I am aware of no

instances in which it has happened, and we don't have a board decision about what the effect of the earlier waiver would be on a non-comparable ground in a subsequent deportation proceeding. And I do think, however, that, regardless of the prosecutorial discretion point here, even if the board were to conclude that the 212(c) waiver carried across and would prevent this alien from being deportable in a subsequent proceeding, an important purpose would still be served by encouraging the alien to get himself into exclusion proceedings at the beginning, because that is what several courts have concluded would be a rational basis for differential treatment in encouraging aliens to seek 212(c) waivers in the exclusion context.

Congress, when it adopted the aggravated felony definition and repeatedly expanded it, it was concerned about criminal aliens in this country, and ways to get them out of this country. And so, to the extent that 212(c) relief still is available for certain LPRs who meet certain threshold criteria and they are being deported on the basis of crimes that would have made them inadmissible -- if an alien then wants to seek 212(c) relief, he can get himself into an exclusion proceeding, or he could seek advanced parole on the I-191 form that Petitioner --

JUSTICE BREYER: You are also telling me that -- I didn't know this; I learn something in every argument -- that if we have Jack the cat burglar who was burgling dozens of office buildings -- and abroad -- and assaults people and hits them over the head or whatever with his -- I guess with his fist, that we have no way of excluding that person, should he try -- I -- I have heard criticisms of our immigration policy, but this is surprising to me, that we have no way of excluding that person who is filled with the simple burglary of office buildings and assaults.

MR. GANNON: Well, there was a separate ground which is two crimes, any two criminal offenses.

JUSTICE BREYER: So he has only done it once; we have to let him --

MR. GANNON: If he has only done it once, then it may well be that it wouldn't qualify. But the board has repeatedly declined to consider whether such a crime, which would be -- could potentially be a ground for exclusion would automatically guarantee that -- that the alien could receive a waiver of any ground of deportability based on the same conviction. And -- and when my friend --

JUSTICE BREYER: I take it they haven't decided. So --

MR. GANNON: No, I'm saying that the board repeatedly declined to apply this analysis in the context of firearms offenses and visa fraud offenses where the alien said my offense is a crime involving moral turpitude; I could have been charged with being -- I could have been excluded on the basis of my visa fraud offense or my assault with a firearm, because assault with a fire arm is a crime involving moral turpitude.

JUSTICE SOTOMAYOR: Could I ask just a practical question? Does this issue go away finally when there are no more St. Cyr people? Meaning is there -- there is no 212(c) anymore.

MR. GANNON: Well, there -- there is a new provision, cancellation of removal, which indisputably just simply is unavailable to anyone with a aggravated felony conviction.

JUSTICE SOTOMAYOR: Exactly.

MR. GANNON: And -- and --

JUSTICE SOTOMAYOR: And so really the issue that we have at the moment is whether your decision to effect what has happened now in the past, to do what Congress has done moving forward, and to avoid St. Cyr, is just to say, if it's an aggravated crime of violence it just doesn't qualify anymore.

That's what you are doing. You're not

giving 212(c) to anybody anymore?

MR. GANNON: Well, we're -- we're giving it to aliens like this, aliens who have older convictions, pre-1996 guilty pleas--

JUSTICE SOTOMAYOR: But you were just saying if they are aggravated -- if they've committed an aggravated crime of violence they are not getting it anymore.

MR. GANNON: That -- that is if it was a crime that was -- a conviction that occurred after 212(c) was repealed. So for instance, in this case if on remand the board considered one of the other charge grounds of deportation.

JUSTICE SOTOMAYOR: But this whole thing goes away once all the St. Cyr people have --

MR. GANNON: Yes, because 212(c) only lives on by virtue of St. Cyr right now. And I -- but -- but I do want to stress that this -- I think Justice Kagan was correct to point out that this was clarifying a previous state of the law. We believe that there are very clear principles on the cases that are cited on page 41 of our brief, that the board had refused to do the analysis on -- on a conviction level as opposed to a categorical level, and my friend keeps quoting Attorney General Thornburgh's opinion in Hernandez-Casillas for

his readoption of the nunc pro tunc doctrine, but I would like to point out that the Attorney General there made it very clear in his holding that he was reaffirming the statutory counterpart doctrine as it existed at the time, and at page 291 of his opinion he says that he rejects the board's attempts to extend 212(c) to, quote, "grounds of deportation that are not analogous to the grounds for exclusion listed in section 212(c)."

JUSTICE GINSBURG: But he also said that there are only two grounds for deportation that have no analog in the grounds for exclusion.

MR. GANNON: That's -- you're --

JUSTICE GINSBURG: Entry without inspection and firearms conviction.

MR. GANNON: That -- that is what footnote 4 of the opinion says. That is clearly an under-inclusive list because it doesn't include visa fraud offensives which had already been recognized in Wadud as being a category that did not have a comparable ground, and -- and that was reaffirmed later in the Jimenez-Santillano opinion. My friend quotes the Jimenez-Santillano opinion in -- in his reply brief for the proposition that Wadud was really about the facts. This was his answer to you, Justice Scalia. But if you look at the

Jimenez summary of what actually happened in Wadud, the other half of the sentence that's being quoted there says the board in Wadud, quote, "observed that we did not need to decide whether Respondent's 1546 offense was a crime involving moral turpitude because no ground of inadmissibility enumerated in section 212(a) of the act was comparable to section 1546." And so --

JUSTICE ALITO: Do you know how potentially how many people may be affected by the decision in this case?

MR. GANNON: I don't have a good estimate of that because we don't know how many offenders with pre-1996 guilty pleas will end up being picked up by immigration authorities and -- and charged under these circumstances. Petitioner is somebody who at -- at the time he committed his offense wasn't even an aggravated felon. It's only by virtue of the retroactive applicability of the definition that he became an aggravated felon. And so that makes the sort of St. Cyr question about his reliance a -- a bit perplexing here.

At the time when he was pleading guilty to voluntary manslaughter, because it wasn't within 5 years of -- of entry, it wouldn't have been a crime involving moral turpitude and therefore it wouldn't have been a ground for deportability, and it also was not yet an

aggravated felony. So he had no reason to think he was pleading guilty to a deportable offense.

JUSTICE ALITO: But do you know how many times this has come up in cases over, let's say the past 5 years?

MR. GANNON: I don't know how many times that -- all of the cases that are cited in Petitioner's brief and -- and the amicus brief, there is a gap between 1996 and about 2003, because of the repeal of 212(c) and St. Cyr and the regulations. There was about a 7-month period after the regulations before the board decided Blake and Brieva-Perez.

There are on the order of several hundred 212(c) applications that are being granted by the board each year right now, but that's with a backlog of cases some of which have been pending for -- for an incredibly long time.

JUSTICE KAGAN: You said, Mr. Gannon, the government no longer treats people differently depending on whether they left the country and returned or haven't left at all. Mr. Fleming points out that you said the opposite in your brief opposing cert. He said that --

MR. GANNON: I -- I appreciate your chance to let me clarify, Justice Kagan. In our brief in opposition, we stated that an alien could avoid the

statutory counterpart rule by leaving the country. That meant that by getting himself into an exclusion proceeding, the statutory counterpart rule then would not be applicable. It didn't mean that had he left the country, come back if they did an exclusion proceeding and they put in a subsequent deportation proceeding, that the statutory counterpart rule wouldn't apply.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Gannon.

Mr. Fleming, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF MARK C. FLEMING

ON BEHALF OF THE PETITIONER

MR. FLEMING: Thank you, Mr. Chief Justice.

I would begin simply by following up on the questions that Justices Ginsburg and Kagan asked to my brother about my client could have been charged as deportable with his conviction treated as a crime involving moral turpitude. In fact, he was. If one looks at the decisions in the appendix to the petition for certiorari, specifically at page 11A, it's clear that his conviction is asserted not only as an aggravated felony crime of violence, but also as a crime involving moral turpitude, and the immigration judge found that he was in fact deportable with that conviction forming a crime involving moral turpitude.

So there is no dispute here that Mr. Judulang's conviction falls into both categories. On the issue of the factual basis of my client's deportability at the time of the plea, Mr. Gannon is correct; there is nothing in the administrative record that says that, and that is why this Court typically does not countenance arguments based on the facts by the respondents that are raised only in the brief on the merits. If anyone had suggested that this was an issue on which a factual record needed to be developed, we could have done it; it would not have been hard.

I also want to comment on one point that Mr. Gannon made, which is the thing that -- that is waived under 212(c) is a ground of deportation. That's not correct. Section 212(c) provides relief from inadmissibility. It says that clearly in its text; that is how the regulations and the decisions have always treated it. The form that immigrants are instructed to fill out, form I-90 -- I-191 which is appended to our blue brief specifically says: State the reasons you may be inadmissible to the United States.

If a waiver of inadmissibility is granted, that waiver protects the immigrant from subsequent deportation based on the same conviction. That is the language of Matter of G-A, which the government itself

excerpts in its brief; and Justice Ginsburg is correct, that is -- they admit that a waiver is durable in that sense. If it is granted to waive inadmissibility, it protects the alien from deportation on any deportation subsection based on that same conviction.

I thought it was telling, Justice Breyer, in reaction to your question which -- which was seeking an explanation of how this scheme is reasonable, the answer that counsel for the government gave was that the BIA has been consistent with firearms and visa fraud cases, but there was no explanation as to how the Blake rule as it is now drawn is in any way a reasonable application of the law. I would submit for the reasons that Your Honor pointed out, which is that we have a number of -- whether one calls them convictions or whether one calls them categories of crimes -- voluntary manslaughter, aggravated burglary -- recall that we are talking about aggravated felony crimes of violence.

I recognize that if we talk about third degree burglary, which could be charged on the basis of someone opening an unlocked door and walking across the threshold, maybe that's not a crime involving moral turpitude but it is probably is not an aggravated felony crime of violence either, certainly not in this Court's decision.

So I would submit that the government has not identified a crime that would be both an aggravated felony crime of violence and yet not a crime involving moral turpitude. The overlap is, I would submit, total. And even if it's not total, that is not the end of our argument because the board itself has said you, don't need a perfect match; you just need substantial overlap. And the overlap is at the very least substantial, if not complete.

The crime that was charged in Brieva-Perez itself, unauthorized use of a vehicle under Texas law, has subsequently held by the Fifth Circuit not to be an aggravated felony at all. So Brieva-Perez on its own terms is no longer good law as we point out in our reply brief.

The interest that Mr. Gannon asserted at one point about getting immigrants to put themselves into exclusion proceedings, this is a very important point. The agency has never suggested that that is the way that it runs the railroad. On the contrary, it has expressly said the opposite.

It does not matter whether the 212(c) application is filed in exclusion proceedings, in deportation proceedings, or outside of proceedings entirely by sending a letter to the district director

saying: Please give me an advance waiver before I travel abroad. The regulations make very clear and the decisions make very clear, I quoted matter of AA in my opening argument, that an application is identical and a relief that is given is identical, regardless of the proceedings.

For Mr. Gannon to stand up and say that the agency is now creating a sharp distinction, saying that applications filed in exclusion are omnipotent, and applications filed in deportation proceedings are meaningless is a clear change in the law, and it is unfair to apply it against immigrants like Mr. Judulang and others who relied on the availability of section 212(c) as protection from removal, whether exclusion or deportation in the future, when they pled guilty.

Justice Sotomayor, your question about how many people are involved here, it is difficult to identify specific numbers because very often these cases are decided at the immigration judge level that are not reported. In the appendix to our petition for certiorari we identified over 160 people who have been subject -- who have suffered under the Blake rule since Blake was decided in 2005.

And part of the problem is that we are talking about a group of people who have been in the

country for a long time, whose convictions are dated, who are law abiding, who are reformed, and they only come to the attention of the authorities subsequently through perfectly law abiding conduct such as applying for naturalization or renewing a green card so that they --

JUSTICE SOTOMAYOR: If they weren't law-abiding, they would have committed a new felony that would render them inadmissible --

MR. FLEMING: And potentially subject them to removal, exactly. And there might be other forms of relief, as Mr. Gannon mentioned. But -- That's certainly right. But a good number of the people here who have been harmed by the Blake rule are people who are the most deserving candidates for relief. And the NIJC brief, I think, sets that out I think quite convincingly.

We would submit that the only reasonable approach here is the one that the agency took for years under Meza and under the eight decisions that Justice Breyer referenced where the immigration knew the rule, they applied it, they looked to the conviction, they figured out whether the conviction would trigger excludability; if it did, then the alien was entitled to apply on the same basis and with the same effect as if

he had found himself in exclusion proceedings.

The judgment should be reversed, and Mr. Judulang should be allowed to file his application for adjudication on the merits.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Counsel, the case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)